APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 14, 2003]

No. 02-10467

AMERICAN EAGLE AIRLINES, INC.,
Plaintiff-Counter-Defendant,
Appellee-Cross-Appellant,

v.

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Counter-Claimant,
Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Texas, Fort Worth

Before WIENER, BENAVIDES, and DENNIS, *Circuit Judges.*

BENAVIDES, *Circuit Judge*:

Before this court is a labor-arbitration dispute between an airline company and a pilots' association arising from an arbitration board's hearing and the subsequent appeal to the district court. While judicial review of an arbitration board's determination is admittedly confined, this controversy is one of the unwonted cases in which overturning an arbitrator's award is proper. As such, we affirm the judgment of the district court, which vacated the arbitrator's award.

I.

The issues in this appeal concern a collective bargaining agreement ("CBA" or "Agreement") entered into in September 1997 by American Eagle Airlines, Inc. ("American Eagle"), and Air Line Pilots Association, International ("ALPA") to govern the working conditions of pilots employed at American Eagle. Included within the Agreement were provisions dictating the conditions for which a pilot may be terminated as well as the procedures to be followed by American Eagle to secure a termination. The CBA permits American Eagle to terminate pilots only for "just cause," a term the Agreement fails to define.

Section 20 of the CBA elucidates the grievance process by which an employee may challenge his termination. A pilot must request initiation of the grievance process within 14 days of receiving written notice of the charges against him, or the employment decision of American Eagle becomes final. If the process is timely invoked, "[a] first step hearing will be held at the pilot's domicile within 14 days of the date written request is received" by American Eagle. Within 14 days of the hearing, American Eagle must issue an opinion on the matter. If the decision is unsatisfactory to the pilot, he may appeal within 30 days by furnishing written notice to the System Board (the "Board"), which serves as a neutral arbitrator under the contract.

Section 20(G)(2) then notes:

> If [American Eagle] fails to provide a written decision to the pilot . . . or hold a required hearing within the time limits specified, the pilot and the Association may consider the grievance denied.

Section 21 then details the duties and functions of the Board. Composed of three members, the Board has "jurisdiction over grievances filed pursuant to the terms of this Agreement." The CBA also protects the Board's right to "act in an

independent manner" without consequences for its relationship to American Eagle or ALPA.

On November 3, 1999, Captain Terry Balser, an American Eagle pilot, struck up a discussion with Boris Walckhoff, a cleaning and catering employee of American Eagle, on board the aircraft Balser piloted at the Los Angeles International Airport. Over the course of the conversation, Balser discussed the ongoing war in Chechnya, and questioned why Walckhoff, an immigrant of African, Russian, and German decent, was not fighting in it. Balser then displayed a medal with a reverse swastika on it and mentioned his displeasure that government money was being spent on African-Americans and Latinos. Walckhoff felt intimidated by this conversation and filed a complaint with American Eagle.

In response to Walckhoff's complaint, American Eagle conducted an investigation of Balser, which included holding two investigative meetings in November 1999. These meetings revealed that Balser regularly carried a dirk with a three and one-half-inch blade into secure areas of the airport, as well as on board the aircraft he flew. Captain Balser also admitted to having "nodded off" at times while on the clock.

On November 29, 1999, American Eagle issued a notice of termination to Balser, advising him that he was being discharged for harassing Walckhoff, failing to observe security regulations regarding weapons in secure areas, violating California penal law and Federal Aviation Administration regulations by bringing weapons on board an aircraft, and violating company policy against sleeping on board an aircraft. On December 9, 1999, 10 days after receiving the notice of termination, ALPA grievance chair Mark Taylor wrote to American Eagle informing it of Balser's intention to invoke the grievance procedures outlined in the CBA. Taylor again wrote American Eagle on February 4, 2000, noting that American Eagle had not scheduled a first-step hearing. The letter referenced a conversation with Los Angeles Chief Pilot

Janette McMurtrie on January 22, 2000, in which McMurtrie indicated her desire to forego the first-step hearing, and told Balser and ALPA to treat the grievance as denied by American Eagle. The matter was then submitted to the Board by ALPA.

After arguments were presented, the Board made several determinations. First, the Board found that American Eagle's failure to schedule the first-step hearing constituted a breach of the CBA, despite the language contained in Section 20(G)(2), which states that failure to schedule a hearing may be considered tantamount to a denied grievance. Second, the Board found that Balser seriously violated the CBA. Specifically, the Board noted that substantial evidence supported American Eagle's contention that Balser had harassed Walckhoff and that such conduct was abhorrent, finding that "the Employer had not only a right, but a duty to rid the workplace of such conduct." The Board also concluded that Balser had violated American Eagle's security rules and California law by bringing his dirk on board his aircraft and into secure areas of the airport. The Board found insufficient evidence to support a finding that Balser had slept while his plane was airborne. The Board, however, concluded that American Eagle had "not only a right, but a duty" to rid itself of Balser's behavior. Finally, the Board concluded that because both Balser and American Eagle had seriously violated the Agreement, both sides deserved a substantial penalty. Accordingly, the Board imposed a ten-week unpaid suspension on Balser and ordered his reinstatement with back pay due for the remaining period in which Balser was suspended.

American Eagle appealed the Board's decision to the United States District Court for the Northern District of Texas, pursuant to the Railway Labor Act, 45 U.S.C. §§ 151-88, arguing in its motion for summary judgment that the Board's decision (i) failed to conform to the terms of the

CBA, (ii) was beyond the jurisdiction of the Board, and (iii) violated public policy. The district court determined that implicit within the Board's opinion was a finding that Balser was fired for "just cause." Once such a determination was made, the district court reasoned, the Board lacked further authority to fashion an alternate remedy based on American Eagle's alleged procedural shortcoming of not holding the first-step hearing. Accordingly, the district court vacated the Board's arbitration award, holding that the Board should have upheld Balser's termination. The district court rejected ALPA's argument that the Board had not found just cause for Balser's termination because American Eagle did not meet the procedural requirements of the CBA, stating that ALPA introduced no authority for the proposition that such requirements could be considered in arriving at the just cause determination. The district court, however, did reject American Eagle's argument that the arbitration award violated public policy. Shortly thereafter, ALPA filed a timely notice of appeal and American Eagle cross-appealed on the public policy issue.

II.

We review *de novo* a district court's decision vacating an arbitration award as not grounded in the agreement of the parties. *E.I. DuPont de Nemours v. Local 900 of the Int'l Chemical Workers Union*, 968 F.2d 456, 458 (5th Cir. 1992). Summary judgment should be granted where the record indicates no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Rogers v. International Marine Terminals*, 87 F.3d 755, 758 (5th Cir. 1996). In considering summary judgment, we must view the evidence in the light most favorable to the nonmoving party. *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Yet, "the nonmoving party must set forth specific facts showing the

existence of a 'genuine' issue concerning every essential component of its case." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

Judicial review of a labor-arbitration decision by this Court, or by the district court, is extremely limited. Where the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority the fact that a court is convinced he committed serious error does not suffice to overturn that decision." *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62 (2000) (internal quotations omitted). Thus, if there is ambiguity as to whether an arbitrator is acting within the scope of his authority, that ambiguity must be resolved in favor of the arbitrator, as the mere "inference" of *ultra vires* action is an insufficient "reason for refusing to enforce the award." *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 598 (1960).

We will not uphold an arbitrator's decision, however, when it dispenses its own "brand of industrial justice" outside the scope of an arbitration agreement. *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Rather, we are free to scrutinize an arbitrator's award "to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 602 (5th Cir. 1989) (citing *Container Prods., Inc. v. United Steelworkers of Am.*, 873 F.2d 818, 820 (5th Cir. 1989)). And, "[w]here an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy." *Delta Queen*, 889 F.2d at 602 (citing *Container Prods.*, 873 F.2d at 820). *See also Houston Lighting & Power Co. v. International Broth. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (If the language of the applicable collective bargaining agreement is "clear and

unequivocal, an arbitrator is not free to change its meaning."). In short, an "arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38.

III.

The two predominant questions presented in this appeal are (i) whether the district court properly determined that the Board found that Balser's conduct constituted "just cause" for his termination and (ii) whether the arbitrator exceeded its jurisdiction by improperly interpreting the terms of the CBA, specifically whether the Board erred in determining that American Eagle's failure to provide Balser with a first-step hearing constituted a serious violation of the Agreement and warranted voiding Balser's termination. As the Board determined that any violation of American Eagle's rules and policies committed by Balser was mitigated by American Eagle's failure to grant him a first-step hearing, the two issues are inextricably linked and it is therefore appropriate to discuss them together.

A.

We begin our analysis by addressing whether American Eagle's failure to provide a first-step hearing constituted a violation of the CBA. In doing so, we consider the relevant language of the Agreement. Section 20(C) of the CBA provides that "[a] first step hearing will be held at the pilot's domicile within fourteen (14) days of the date written request is received" by American Eagle. It is undisputed that this so-called first-step hearing never took place. Section 20(G)(2) provides further that if American Eagle fails to hold a required hearing, including, *inter alia*, a first-step hearing, the pilot "may consider the grievance denied." Section 21 of the CBA then provides for establishing the Board "for the purpose of adjusting disputes or grievances arising under" the Agreement. The Board determined that by failing to schedule the first-step hearing, American Eagle breached the CBA.

American Eagle disagrees with this assessment, arguing that although it did not provide the first-step hearing, it did not breach the CBA because ALPA chose to treat the failure to hold the first-step hearing as a denied grievance when it submitted the matter to arbitration.

Although we are not unmindful of the high degree of deference the federal courts generally afford arbitrators, *see, e.g., Eastern Associated Coal*, 531 U.S. at 62, an arbitrator may not ignore the plain language of a collective bargaining agreement. *Misco*, 484 U.S. at 38. And, the clear language of the CBA precludes determining that American Eagle's failure to schedule a first-step hearing is a procedural default *if* ALPA chooses to treat such failure as a denied grievance and proceed to arbitration. Put differently, although the Agreement specifically provides for a first-step hearing when a pilot files a grievance, Section 20(G)(2) establishes that the failure to conduct such a hearing should be treated no differently than a first-step hearing at which the pilot's plea for relief is unsuccessful, provided that the pilot chooses to treat the lack of the hearing as a denied grievance and proceed to arbitration.

Here, ALPA and Balser did choose to treat American Eagle's failure to provide a first-step hearing as a denied grievance and elected to proceed to arbitration.[1] When American Eagle failed to provide the first-step hearing, ALPA did not insist that such a hearing be held. Rather, ALPA elected to arbitrate, thereby treating the lack of the hearing as a denied grievance. Furthermore, while ALPA argued before the arbitrator that the lack of the first-step hearing denied Balser due process, it was never asserted that the appropriate remedy for such an alleged violation would be

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[1] This decision is consistent with previous disputes between American Eagle and ALPA, where there were no first-step hearings and ALPA and its associated pilots, without protest, simply proceeded to arbitration.

to compel American Eagle to conduct the hearing. ALPA grieved the termination, not the post-termination first-step hearing, the absence of which ALPA treated as a denial allowing it to proceed to arbitration. By invoking arbitration, ALPA implicitly considered the grievance denied and waived any other alternative it may have had concerning American Eagle's failure timely to conduct a first-step hearing. This comports with the district court's interpretation of the CBA; specifically, that if a first-step hearing does not occur and ALPA invokes arbitration, it has considered the grievance denied within the meaning of Section 20(G)(2) and has waived any claim it might have had based on American Eagle's putative procedural default. Accordingly, American Eagle has committed no default of the CBA.

B.

Having determined that American Eagle's failure to schedule a first-step hearing did not constitute a procedural default of the CBA—or, even if it could have, that such a default was cured by waiver when ALPA proceeded to invoke arbitration—it is now necessary to determine whether there was just cause to terminate Balser. While the Board never used the phrase "just cause," it did hold that Balser's conduct was egregious and, therefore, must be removed from the workplace.[2] Citing *DuPont*, the district court held that the Board implicitly found just cause for Balser's termination. 968 F.2d at 458 (holding that just cause for termination may determined implicitly by an arbitrator). Once just cause existed, the district court reasoned, there was no jurisdiction for the Board to permit any outcome other than Balser's termination, even if a procedural default occurred. In support of this conclusion, the district court noted that the CBA

[2] Of course, the Board determined that American Eagle's alleged procedural default, which we have now concluded was not a default, prevented Balser's termination.

required only just cause for dismissal, rather than just cause *plus* scheduling a first-step hearing.

Not surprisingly, the parties maintain disparate views regarding the determination of the district court. American Eagle agrees with the district court's assessment that the Board implicitly found just cause and then exceeded its jurisdiction by improperly considering the lack of the first-step hearing so as to save Balser's job. On the other hand, ALPA denies that the Board ever found just cause for Balser's termination. Furthermore, ALPA asserts that the failure to schedule the first-step hearing was a component used to determine whether just cause for termination existed at all. If a supposed procedural default—here, the lack of the first-step hearing—necessarily precludes a finding of just cause, ALPA argues, there is no ground for Balser's termination. Thus, while American Eagle argues that the Board did find just cause but did not uphold Balser's termination because of the supposed procedural default, ALPA believes that the Board never found just cause, in part because of the lack of the initial hearing. We now address these competing theories, analyzing them in light of our determination that American Eagle's failure to schedule the first-step hearing did not constitute a procedural default of the CBA.

At issue, then, is whether the Board could properly consider any supposed procedural violation by American Eagle in its "just cause" analysis and, alternatively, whether an alleged procedural failing could prevent termination of an employee who had already been discharged for just cause. First, as noted, *supra*, American Eagle committed no procedural violation of the CBA. This reason alone is sufficient to conclude that the Board erred if it considered such conduct either in its just cause calculus or to mitigate a finding of just cause.

Second, and alternatively, even if the failure to hold the first-step hearing were a procedural default, it would be improper to consider this failure in the just cause analysis or to prevent the termination of an employee who had already been discharged for just cause. Indeed, the procedural violation alleged by ALPA—*i.e.*, failure to conduct a first-step hearing—occurred *after* Balser committed the acts cited by American Eagle and the district court as constituting grounds for termination, and *after* Balser was terminated on those grounds. Thus, this putative procedural default could not have been properly considered in determining whether Balser's actions constituted just cause for his termination. ALPA, however, attempts to argue that there is authority for the proposition that contractual procedural requirements can be considered by arbitrators in determining whether cause for dismissal exists. While no circuit authority specifically permits a procedural default to affect the just cause calculus, ALPA cites to *Chauffeurs, Teamsters and Helpers Local Union 878 v. Coca Cola Bottling Co.*, 613 F.2d 716 (8th Cir. 1980), in which the Eighth Circuit held that an arbitrator could consider a company's failure to abide by a bargaining agreement's procedural requirements in determining whether cause existed for dismissal. In *Chauffeurs*, the employer's alleged procedural default was that the employee "was not afforded an opportunity to tell his side of the story prior to termination." 613 F.2d at 717. Importantly, *Chauffeurs* and similar cases [3] concern only a company's pretermination procedural failings within the just cause determination. At issue here, however, is American Eagle's post-discharge behavior, which is a different matter entirely, as this circuit

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[3] Other courts outside this circuit have approved the rule in *Chauffeurs*. *See, e.g., Anaconda Co. v. District Lodge No. 27 of the Int'l Assn. of Machinists and Aerospace Workers*, 693 F.2d 35, 37 (6th Cir. 1982); *Safeway Stores v. United Food and Commercial Workers Union*, 621 F. Supp. 1233, 1237-38 (D.D.C. 1985).

and the Supreme Court have recognized. *See Misco*, 484 U.S. at 40 n.8; *Gulf Coast*, 991 F.2d at 247. In *Misco*, the Supreme Court held that "[l]abor arbitrators have stated that the correctness of a discharge must stand or fall upon the reason given at the time of discharge." 484 U.S. at 40 n.8. Furthermore, in *Gulf Coast*, an employee was terminated for violating his employer's substance abuse policy, but the arbitrator reinstated the employee with rehabilitation conditions based on his finding that the employee's post-termination conduct indicated he was a prime rehabilitative candidate. 991 F.2d at 247. We vacated the arbitration award, ruling that the arbitrator acted outside the authority of the relevant collective bargaining agreement when it considered the employee's post-termination conduct. *Id.* at 255 ("[A]n arbitrator [is] to look only at the evidence before the employer at the time of the discharge."). Accordingly, it was inappropriate if the Board considered American Eagle's post-termination conduct in determining whether Balser was terminated for cause. Thus, American Eagle's alleged procedural default cannot be used in the just cause analysis.

Furthermore, a procedural default may not be used to offset a finding of just cause for termination. Assuming Balser's actions constituted just cause for his termination, the Board had no jurisdiction not to terminate him, regardless of any alleged default committed by American Eagle, given that Section 20(A)(2) of the CBA notes that *only* just cause is necessary for termination. As the Agreement does not require just cause plus the absence of any alleged procedural deficiencies by American Eagle to support termination, the Board cannot impose this requirement, as the district court properly recognized. Thus, the Board erred when it considered the failure to hold the first-step hearing in its just cause analysis or as a mitigating factor after determining that there was just cause for Balser's discharge, because the

failure to hold the first step hearing (i) did not breach the CBA and, in any event, (ii) can neither preclude nor mitigate just cause.

C.

Given that the Board could not have considered any alleged post-termination procedural violation by American Eagle in its determination of just cause and that such a determination turns solely on the pilot's conduct, we turn now to the Board's opinion to determine whether the district court properly held that the Board issued an implied finding of just cause. In this circuit, we have long recognized that where an arbitrator implicitly finds that just cause exists, it need not recite the operative phrase "just cause." *See DuPont*, 968 F.2d at 458-59 (citing *Delta Queen*, 889 F.2d at 602). Indeed, the phrase "just cause" "carries no talismanic significance in labor jurisprudence." *Delta Queen*, 889 F.2d at 602. Rather, "[i]t is simply a term of art that defines the many unrelated, independent acts that serve as grounds for employee discipline under" a collective bargaining agreement." *Id.* In *Delta Queen*, for instance, we held that an explicit finding by the arbitrator of "gross carelessness" satisfied the collective bargaining agreement's requirement that individuals may be disciplined only upon a showing of "proper cause." *Id.* at 604. Thus, we have long held that implicit findings of just cause for termination warrant the same significance and carry the same force as explicit findings.[4]

The district court did not err in determining that Balser's actions constituted just cause for his termination. Indeed, the Board determined that Balser's "violation" of American Eagle's "anti-harassment policy" provided American Eagle with "not only a right, but a duty to rid the workplace" of Balser's conduct. The Board also addressed the seriousness of Balser's bringing his dirk onboard the aircraft he flew, noting

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[4] *See DuPont*, 968 F.2d at 458-59; *Delta Queen*, 889 F.2d at 602.

that doing so clearly violated American Eagle rules. Thus, the district court was correct to conclude that there was an implicit finding of just cause because the Board's opinion concludes that Balser's conduct clearly justified his firing. As the CBA authorizes discharge only for just cause, the Board, by necessary implication, determined that just cause existed for Balser's termination.[5]

ALPA argues that the well-settled rule of *DuPont* and *Delta Queen*—*i.e.*, that an arbitrator's finding of "just cause" may be implicit—is limited to the facts of those cases and should not be applied here. This argument fails for at least two reasons. First, there is simply nothing in the language of *DuPont* or *Delta Queen* to suggest that these holdings were unique to their respective facts. On the contrary, our citing *Delta Queen* in the *DuPont* opinion indicates our intention that just cause may be found implicitly. *See DuPont*, 968 F.2d at 458-49.

Second, any reliance on our holding in *Weber Aircraft Inc. v. General Warehousemen and Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001), for the proposition that *DuPont* and *Delta Queen* are inapplicable to this case is misguided. In *Weber*, we considered whether an arbitrator's finding that a worker committed a violation of a certain offense category (there, "Category 1") that contemplated a variety of penalties—including termination—compelled the conclusion that there was just cause for termination. 253 F.3d at 824. The *Weber* holding noted only that it was improper to infer a finding of just cause for termination based only upon the

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[5] In this case, the reasoning by implication is as follows: (1) to constitute grounds for termination under the CBA, the act or acts in question must constitute just cause, *i.e.*, an employee can be terminated for any act or acts that constitute just cause; (2) the Board found that Balser seriously violated his obligations and that American Eagle had a duty to rid the workplace of Balser's conduct; (3) thus, the Board must have found that American Eagle had just cause to terminate Balser.

arbitrator's determination that the employee in question had committed a violation of Category 1, because Category 1 contemplated penalties short of discharge. *Id.* at 825. Because workers who ran afoul Category 1 could be punished in a variety of ways, a violation of Category 1 was not tantamount to termination. *Id.* Thus, our holding in *Weber* did nothing to undercut the rule of *DuPont* and *Delta Queen* that a finding of just cause may be implicit. In fact, it was noted that neither case was applicable to the precise issues presented in *Weber*. *Id.* The district court, therefore, did not err in holding that there had been an implicit finding of just cause, which is tantamount to an explicit finding of the same, in the Board's arbitration opinion.

D.

Having determined that the district court correctly held that the Board implicitly found just cause for Balser's termination, the next question is whether the district court was correct to set aside the arbitration award, given that the Board was without jurisdiction to fashion a remedy beyond what was contemplated in the CBA, namely that an employee can be terminated only for just cause. The district court's analysis is correct: if the relevant bargaining agreement requires just cause for dismissal, an arbitrator acts beyond its jurisdiction by fashioning an alternate remedy once it has concluded—implicitly or otherwise—that an employee's conduct constitutes just cause for dismissal, as the Board did here. *DuPont*, 968 F.2d at 459; *Delta Queen*, 889 F.2d at 604. Accordingly, the Board was without jurisdiction to craft a remedy based upon American Eagle's supposed post-termination violation of the CBA. Furthermore, and alternatively, even if it were proper to allow an employer's violation of a collective bargaining agreement in these

circumstances to offset a for-cause termination, it could not be done here as the employer, American Eagle, did not violate the CBA.[6]

IV.

Accordingly, we the affirm the district court's grant of summary judgment vacating the arbitration award.

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[6] As the foregoing analysis is sufficient to affirm the judgment of the district court, it is unnecessary for us to address the remaining issue on appeal, *i.e.*, whether the district court erred in determining that the Board's decision to reinstate Balser did not violate public policy.

DENNIS, *Circuit Judge*, dissenting:

Our review of arbitration awards is under a highly deferential standard that requires us to enforce arbitration judgments that even "arguably construe or apply" a contract, even when we believe that construction reflects "serious error." *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62 (2000). Because I believe the majority does not adhere to this standard, I respectfully dissent.

The majority begins its analysis by taking aim at the arbitrator's finding that American Eagle violated the plain terms of the collective bargaining agreement by failing to timely schedule a first-step hearing. Section 20(C) of the agreement says such a hearing "***will be held*** at the pilot's domicile within fourteen days" (emphasis added) of receipt of a timely request for a hearing. The arbitrator reasoned that because the Airline Pilots Association (ALPA) and Balser made a timely hearing request, the airline's failure to schedule the hearing constituted a breach of Section 20(C).

The majority contends that the arbitrator erred in finding a contract violation because ALPA and Balser waived their right to a first-step hearing when they "elected to proceed to arbitration" under Section 20(G)(2).[1] The arbitrator expressly rejected this contract interpretation in reaching its decision. The arbitrator explained that Section 20(G)(2) addressed the union's procedural quandary of where to go when the employer failed to provide the required hearing, and did not address what the remedy would be for the airline's failure to provide the required hearing. Using that procedure merely "facilitate[d] [ALPA's] attempt to get to the next hearing

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[1] Section 20(G)(2) states: "If the Company fails to . . . hold a required hearing within the time limits specified, the pilot and the Association may consider the grievance denied."

level," and did not waive any remedies for the airline's violation of the contract.

If the arbitrator was "even arguably construing or applying the contract and acting within the scope of [its] authority," in reaching this result, "the fact that a court is convinced he committed serious error does not suffice to overturn that decision." *Eastern Associated Coal* 531 U.S. at 62. Here, there is no question that the arbitrator was "arguably construing or applying the contract" in finding that American Eagle violated the collective bargaining agreement. Section 20(C) expresses the first-step hearing requirement in mandatory terms, and American Eagle did not abide by that section. While the scope of the remedy provided by Section 20(G) is susceptible to alternative interpretations, the majority is incorrect in finding that the arbitrator's view of that section as procedural is not even an "arguable" construction. And because the arbitrator was arguably applying the contract, the majority should not have disturbed that interpretation on review. "[A] court should not reject an award on the ground that the arbitrator misread the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

Thus, the central question here is whether the arbitrator exceeded his authority in considering American Eagle's breach of the collective bargaining agreement in determining whether the airline could terminate Balser. "Collective bargaining agreements often say little or nothing about the arbitrator's remedial powers; yet it cannot be that he has none . . . [rather] the agreement must implicitly grant him remedial powers where there is no explicit grant." *Miller Brewing v. Brewery Workers Local 9*, 739 F.2d 1159, 1163 (7th Cir. 1984). In the context of evaluating terminations of employees, arbitrators have used this broad remedial power to reduce or reverse the discipline meted out to employees where an employer has not abided by the labor agreement's prescribed grievance process. *See* 9 TIM BORNSTEIN ET AL., LABOR AND

EMPLOYMENT LAW § 11.09 (2003) (explaining the wide discretion arbitrators have in altering employee discipline based on employer violations of grievance procedures).

For example, in *Teamsters Local Union No. 284 v. Maremont Corp.*, 515 F.Supp. 168 (S.D. Ohio 1980), employees of Maremont engaged in an illegal wildcat strike that ordinarily may have been grounds for terminating the employees. However, the company did not abide by the collective bargaining agreement's requirement that it give written reasons for termination and conduct a hearing within 72 hours of termination. *Id.* at 170. The arbitrator concluded that the employees had been denied "contractual due process," and thus ordered the employees reinstated with backpay. *Id.* The district court upheld the arbitrator's award explaining that the arbitrator had interpreted the contract's procedural requirements as a mandatory obligation to which there had been no waiver. *Id.* at 173. Because this was a contract interpretation the court concluded it lacked the power to disturb it even though it would likely not have made the same interpretation itself. *Id.*

Courts have allowed arbitrators to go even further and read procedural guarantees into just cause even where they are not found in the contract. In *Chauffeurs, Teamsters and Helpers Local Union 878 v. Coca Cola Bottling Co.*, 613 F.2d 716 (8th Cir. 1980), it was undisputed that the employee to be terminated engaged in dishonest behavior that would be sufficient grounds to fire that employee under the labor agreement. The arbitrator reinstated the employee, however, because Coca Cola failed to provide all the reasons for firing the employee prior to his grievance hearing, thus depriving the employee of an adequate opportunity to rebut the charges. *Id.* at 717. The Eighth Circuit upheld the arbitrator's decision, finding that the arbitrator had interpreted the just cause provision as including procedural rights for the employee and that because this was an "arguable" contract interpretation the

court lacked the power to disturb it. *Id.* at 721. Other courts to have considered the issue have followed the Eighth Circuit and allowed arbitrators to include procedural requirements as components of just cause, even when those requirements are not spelled out in the contract. *Anaconda Co. v. District Lodge No. 27 of the Int'l Assn. of Machinists and Aerospace Workers*, 693 F.2d 35, 37 (6th Cir. 1982); *Safeway Stores v. United Food and Commercial Workers Union*, 621 F.Supp. 1233 (D. D.C. 1985).

Our case is akin to *Maremont* and even easier than *Chauffeurs*. The arbitrator made the contract interpretation that the grievance procedures spelled out in the contract were mandatory, and that because American Eagle did not abide by those requirements it did not have just cause to terminate Balser. This was an "arguable" contract interpretation, and therefore one that we are not empowered to upset here. *Eastern Associated Coal* 531 U.S. at 62. *See also* ELKOURI & ELKOURI: HOW ARBITRATION WORKS 919 (Marlin M. Volz & Edward P. Goggin eds., 2nd ed. 1991) ("Arbitrators will, in many cases, refuse to uphold management's action where it failed to fulfill some procedural requirement specified by the agreement.")

The majority attempts to avoid this straightforward analysis by asserting that the arbitrator lacked the authority to consider American Eagle's post-termination procedural violations in deciding whether the airline had just cause to fire Balser. If any such limitation exists on the arbitrator's authority, it must be found in the collective bargaining agreement.[2] *Misco*, 484 U.S. at 39-40. The majority argues

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[2] In *Misco* the Court reversed the Fifth Circuit's decision refusing to enforce an arbitrator's award because the arbitrator had failed to consider all the evidence available to him in making his decision. The Court explained that barring fraud or gross misconduct the only limitation on an arbitrator's evidentiary determinations dwell in the contract. *Misco*, 484 U.S. at 39. The only such limitation in *Misco* was a ban on hearsay

that Section 20(A)(2) is that limitation because it "does not require just cause plus the absence of any alleged procedural deficiencies by American Eagle to support termination."

Section 20(A)(2) states, "[a] pilot who has completed his probationary period will not be discharged or disciplined without just cause." While this section does not require more than just cause to terminate an employee, it does not define what that term means. Based on the mandatory language of Section 20(C), the arbitrator has concluded that the contract intended just cause to include the requirement that the employer hew to the prescribed grievance procedures. This was an "arguable" contract interpretation not in conflict with the contract's plain language, and therefore not subject to judicial reversal. *Eastern Associated Coal* 531 U.S. at 62. Consequently, the majority's substitution of its own interpretation of Section 20(A)(2) of the contract was legally erroneous.

The majority also suggests that there may be a federal common law prohibition on an arbitrator's consideration of an employer's post-termination behavior in determining just cause. Assertion of such a prohibition is contrary to *Misco*, which explained that "procedural questions which grow out of the dispute and bear on its [just cause determination] are to be left to the arbitrator," except where fraud or gross misconduct are alleged. *Misco*, 484 U.S. at 40.

Moreover, the case cited by the majority for this federal common law limitation on arbitrator discretion in fact reiterates the foundational rule that the limits on an arbitrator's discretion are only found in the collective bargaining agreement itself. In *Gulf Coast Industrial Workers Union v.*

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evidence, which the arbitrator did not transgress. *Id.* Because fraud or gross misconduct did not motivate the arbitrator, the reviewing court was powerless to impose additional evidentiary requirements on the arbitrator. *Id.* at 40.

Exxon Co., 991 F.2d 244 (5th Cir. 1993), the labor agreement in question stated that Exxon "shall have the right to discipline and discharge employees for just cause." *Id.* at 247. The contract further specified that drug use constituted just cause, and rendered an employee "liable to discharge on the first offense." *Id.* This contract language imposed the relevant restriction on the arbitrator: once an arbitrator found that drug use had occurred, termination had to be upheld. Thus, we refused to enforce the arbitrator's award where he reinstated an employee who had been found using drugs because the contract limited the arbitrator's discretion once just cause was found. *Id.* at 256. *See also Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Association*, 889 F.2d 599, 604 (5th Cir. 1989) (finding that because contract defined "proper cause" for termination as including "carelessness," once that finding was made no further inquiry was appropriate). Here there is no such contractual definition of just cause limiting the arbitrator's discretion. Absent such a restriction, the arbitrator was free to consider the contractual due process as a component of just cause. *Chauffeurs*, 613 F.2d at 721; *Maremont Corp.*, 515 F.Supp. at 173. *Cf. Weber Aircraft v. General Warehousemen & Helpers Local Union*, 253 F.3d 821. 824-25 (5th Cir. 2001) (explaining that where contract did not strictly define just cause, nor limit the arbitrator's discretion in deciding penalties, arbitrator was free to fashion a lesser remedy than discharge for less aggravated infractions).

Finally, the majority holds that the arbitrator implicitly found just cause here, and therefore that it exceeded its authority in then considering American Eagle's contract violations in reducing Balser's punishment. In reaching this conclusion the majority misinterprets the import of our decisions in *Delta Queen* and *E.I. DuPont de Nemours v. Local 900 of the Int'l Chemical Workers Union* ("*Dupont*"),

968 F.2d 456 (5th Cir. 1992) , and fa'ls to follow *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960).

In *Delta Queen* we explained that the phrase just cause "carries no talismanic significance in labor jurisprudence." *Delta Queen*, 889 F.2d at 604. "If a collective bargaining agreement defines 'proper cause' to include a nonexhaustive list of offenses, an arbitrator cannot ignore the natural consequence of his finding that a listed offense was committed." *Id.* Thus, in *Delta Queen* because "proper cause" was defined to include carelessness, and the arbitrator found carelessness, he implicitly found "proper cause" even if he never used those words. *Id.* We then applied this rule to similar circumstances in *DuPont*, holding that where the arbitrator found the use of drugs on company premises was "a discharge offense," and then found that conduct occurred, a just cause finding was implicit. *DuPont*, 968 F.2d at 458-59.

In contrast to *Delta Queen*, here there is no contractual list of offenses that constitute just cause, the finding of which terminated the arbitrator's discretion. And unlike *DuPont* the arbitrator here never stated that the offenses that he found Balser guilty of were offenses that themselves constituted just cause. The majority argues that the arbitrator's statement that "[t]he Employer has not only the right, but a duty to rid the workplace of such conduct," (referring to harassment) was such a statement. But the arbitrator's statement that the airline had the right to rid the workplace of harassment is not the same as finding just cause to terminate Balser. Many steps short of termination would severely punish Balser for engaging in unacceptable conduct and deter the conduct from recurring, thereby "ridding" the workplace of that behavior. Likewise, while the arbitrator did find that Balser had violated company rules by arming himself with a dirk on board an aircraft, it never suggested that this rule violation was itself a ground for discharge. Contrary to the majority's

suggestion, then, there is nothing in the arbitrator's opinion which mandates the inference that the arbitrator found just cause.

Absent such a necessary logical implication, as in *Delta Queen* and *DuPont*, we lack the authority to imply just cause, where, as here, it results in a finding that the arbitrator exceeded his untrammeled authority to interpret and determine just cause. If there is ambiguity as to whether an arbitrator is acting within the scope of his authority, that ambiguity must be resolved in favor of the arbitrator, as a mere "inference" of ultra vires action is insufficient "reason for refusing to enforce the award." *United Steelworkers*, 363 U.S. at 598.

Thus, I believe that the arbitrator was acting within the scope of his contractual authority by interpreting the contract to authorize it to consider the airline's violation of Section 20(C)'s first-step hearing in determining just cause. I would, therefore, reverse the judgment of the district court and enforce the arbitration award.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

[Filed April 9, 2002]

No. 4:01-CV-0917-A

AMERICAN EAGLE AIRLINES, INC.,
Plaintiff,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant.

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES, DECREES, and DECLARES that the opinion and award of the System Board of Adjustment dated July 27, 2001, the subject of this action be, and is hereby, set aside and vacated.

The court further ORDERS, ADJUDGES, and DECREES that defendant, Air Line Pilots Association International, take nothing on its claim against plaintiff, American Eagle Airlines, Inc., and that plaintiff have and recover its court costs from defendant.

SIGNED April 9, 2002.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

[Filed April 9, 2002]

No. 4:01-CV-0917-A

AMERICAN EAGLE AIRLINES, INC.,
Plaintiff,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant.

MEMORANDUM OPINION
and
ORDER

Came on for consideration the motion of plaintiff, American Eagle Airlines, Inc., for summary judgment and the motions of defendant, Air Line Pilots Association, International, to dismiss, for summary judgment, and for expedited consideration. The court, having considered the motions, the responses, the replies, the record, the summary judgment evidence, and applicable authorities, finds that plaintiff's motion should be granted and that defendant's motions should be denied.[1]

I.

Claims Asserted

On November 16, 2001, plaintiff filed its complaint for review and vacation of arbitration award, and on March 7,

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[1] The request for expedited consideration is moot, as the court is now considering the merits of the claims asserted in this action.

2002, having obtained leave of court, filed its amended complaint for review and vacation of arbitration award. The action is brought under the Railway Labor Act, 45 U.S.C. §§ 151-88 ("RLA") to overturn an arbitration award issued under an arbitration procedure contained in a collective bargaining agreement between plaintiff and defendant. Plaintiff contends that the arbitration award fails to conform to the terms of the collective bargaining agreement and was beyond the jurisdiction of the System Board of Adjustment. Plaintiff also contends that the award violates public policy. By a counterclaim, defendant seeks enforcement of the arbitration award and statutory costs and attorney's fees pursuant to the RLA, 45 U.S.C. § 153 First (p).

II.

Grounds of the Motions

Defendant contends that the amended complaint should be dismissed under FED. R. CIV. P. 12(b) (1) for lack of jurisdiction because plaintiff has failed to "specify facts [that] would cause this Court to invoke its extremely limited review jurisdiction under the RLA." Def.'s Br. in Supp. of Mot. to Dismiss at 8. The brief goes on to discuss reasons why plaintiff's claims are without merit. As a result, defendant contends it is entitled to judgment enforcing the award and granting it a statutory award of attorney's fees and costs.

Plaintiff seeks judgment as a matter of law that the arbitration award should be vacated for two reasons. First, the System Board of Adjustment failed to confine itself to matters within its jurisdiction. Second, the award is contrary to public policies regarding harassment and air travel security.

III.

The Motion to Dismiss

When considering a motion to dismiss for lack of subject matter jurisdiction, the court construes the allegations of the

complaint favorably to the pleader. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). However, the court is not limited to a consideration of the allegations of the complaint in deciding whether subject matter jurisdiction exists. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). The court may consider conflicting evidence and decide for itself the factual issues that determine jurisdiction. *Id.* Because of the limited nature of federal court jurisdiction, there is a presumption against its existence. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). A party who seeks to invoke federal court jurisdiction has the burden to demonstrate that subject matter jurisdiction exists. *McNutt*, 298 U.S. at 178; *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

Here, the court is satisfied that plaintiff has met its burden. Under the RLA, a court may review an arbitration award if (a) the System Board failed to comply with the RLA, (b) the System Board failed to limit itself to matters within its jurisdiction, or (c) the award is tainted by fraud or corruption. 45 U.S.C. § 153 First (q); *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93 (1978). Additionally, courts may refuse to enforce awards that contravene clear, well-defined public policies. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) Plaintiff has pleaded that two of these conditions exist. Defendant does not seriously contend that the court lacks jurisdiction. Rather, its focus is on the alleged lack of merit of plaintiff's position. Thus, the motion to dismiss will be denied.

IV.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material

fact and as to which the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson*, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the non-moving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Simmons v. Lyons*, 746 F. 2d 265, 269 (5th Cir. 1984).

The standard for granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp.*, 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597.

V.

Undisputed Evidence

The following is an overview of evidence pertinent to the motions for summary judgment that is undisputed in the summary judgment record:

> Defendant is a labor union representing the pilots employed by plaintiff. Plaintiff operates a passenger airline service and is a carrier by air as defined by the RLA. Plaintiff and defendant are parties to a collective bargaining agreement covering pilots employed by plaintiff. The agreement includes a grievance procedure whereby pilots can resolve disputes with plaintiff through final and binding arbitration.

Plaintiff's employment policies and rules of conduct specifically prohibit employees from engaging in any discriminatory or harassing conduct based on any personal status or criteria protected by law, including, but not limited to, a person's race and national origin. Rule 10 of the employee rules of conduct cautions employees to "be sure to observe security and smoking rules in all areas you work or visit." Pl.'s App. at 15. Rule 34 provides, in pertinent part: "Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal." *Id.* at 15-16. And, Rule 36 provides: "The possession of firearms, explosives, or other weapons on Company property or while attempting to access secured areas, aircraft, or Company property, or knowingly permitting another employee to do so, is strictly prohibited. This includes both on and off duty periods." *Id.* at 16.

In November 1999, a ramp service employee of plaintiff complained that Captain Terry Loy Balser ("Balser") had made inappropriate statements to him. The complainant was a black employee of African, French, and German descent. During their conversation, Balser had displayed a "reverse Swastika" medal that he had reason to believe would be

perceived as offensive by African-Americans. He also suggested that it was unfortunate that "our tax money" is going to African-Americans and Latinos. *Id.* at 14. Balser had been warned previously about the importance of complying with the anti-harassment policy of plaintiff. Plaintiff's chief pilot removed Balser from flight status pending an investigation. The investigation led to further allegations of misconduct by Balser. On the basis of an interview with flight attendants, a search was made of Balser's flight bag, which had been left by him in the crew room. Found in the bag was an item the chief pilot described as a weapon called a dirk. The weapon was a hard plastic knife-like object about seven inches long, with a three-sided blade, itself three-and-one-quarter-inches long. The blade narrowed to a sharp point at the tip. The dirk was made of material that allowed it to pass through airport security screening systems.

Plaintiff held two investigative meetings with Balser in November 1999. By letter dated November 29, 1999, plaintiff discharged Balser for engaging in conduct regarded as improper harassment based on race and national origin, for carrying a dirk into secured areas of airports and onto plaintiff's aircraft, and for "nodding off" in the cockpit while ostensibly in command of an aircraft carrying passengers in flight. (This latter conduct came to light in interviews with other pilots. Balser admitted to "nodding off" in the cockpit.)

On December 8, 1999, defendant filed a grievance and requested an investigation and hearing concerning whether plaintiff had just cause to terminate Balser. The collective bargaining agreement between the parties provides for grievances and states, in pertinent part:

> C. HEARINGS AND APPEALS.
>
> 1. A first step hearing will be held at the pilot's domicile within fourteen (14) days of the date written request is received by the Vice President of Flight Operations with a copy to the Domicile Chief Pilot. The

> aggrieved pilot(s) will be given at least seventy-two (72) hours notice of the time and date for such hearing.

Pl.'s App. at 370. The agreement further provides:

> G. GENERAL PROVISIONS.
>
> * * * *
>
> 2. If the Company fails to provide a written decision to the pilot and/or LEC Grievance Representative, or hold a required hearing within the time limits specified, the pilot and the Association may consider the grievance denied.

Id. at 371. Plaintiff did not schedule a hearing, so defendant proceeded to the next level of review, the System Board of Adjustment.

The System Board of Adjustment was comprised of three members, one selected by plaintiff, one selected by defendant, and one neutral member, who served as referee. The Board held hearings on October 3, 4, and 5, 2000, and March 23, 2001. The parties filed briefs on June 3, 2001. And, on July 27, 2001, the Board issued its opinion and award. Pursuant to the collective bargaining agreement the Board had "jurisdiction over grievances filed pursuant to the terms of this Agreement. The Board [did] not have any power to alter or amend the provisions of this Agreement." Pl.'s App. at 374.

In its opinion and award, the Board defined the issues as follows:

> (1) Does the evidence establish just cause under Section 20, A, 2 for the "Final Advisory/Termination" issued to Captain Terry L. Balser, effective November 29, 1999?
>
> (2) If not, what is the remedy?

Pl.'s App. at 2. Although the Board concluded that plaintiff had just cause to terminate Balser,[2] the Board decided that Balser should be reinstated with some back pay to "remedy the fact that Captain Balser was denied the opportunity for a timely first step hearing." *Id.* at 21. The Board ordered that Balser's discharge be reduced to a disciplinary suspension and directed plaintiff to reinstate him with no loss of seniority and full contract benefits, with the exception of back pay in the amount of one-half of what he otherwise would have received had he been exonerated.

VI.

Did The Board Go Beyond Its Jurisdiction?

One of the circumstances in which the court can set aside an arbitration award is where the System Board has gone beyond its jurisdiction. *Union Pac.*, 439 U.S. at 93. An award must draw its essence from the collective bargaining agreement between the parties and may not simply reflect the arbitrator's own notions of industrial justice. *Eastern Associated Coal Corp. v. United Mine Workers of Am. Dist. 17*, 531 U.S. 57, 62 (2000); *Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers*, 71 F.3d 179, 182 (5th Cir. 1995). An award fails to draw its essence from the agreement where:

> 1) the award conflicts with the express terms of the agreement, 2) the award imposes additional requirements that are not expressly provided in the agreement, 3) the award is without rational support or cannot be rationally derived from the terms of the agreement, or 4) the award is based on general considerations of fairness and equity rather than the precise terms of the agreement.

Airline Prof'ls Ass'n v. ABX Air, Inc., 274 F.3d 1023, 1030 (6th Cir. 2001).

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[2] Although the Board did not use the words "just cause," the language used constituted an implicit finding of just cause. *See E.I. DuPont de Nemours & Co. v. Local 900*, 968 F.2d 456, 458 (5th Cir. 1992).

Here, the award conflicts with, and imposes additional requirements not expressly provided in, the agreement, because it requires more than just cause to terminate a pilot.[3] The award imposes the additional requirement of a first step hearing, even though the agreement reflects that the hearing may be waived—"the pilot and Association may consider the grievance denied," Pl.'s App. at 371—and the pilot may proceed to the System Board. That is exactly what happened in this case.

Defendant argues that whether a procedural first step hearing was conducted affects the just cause determination.[4] In other words, in determining whether just cause for Balser's termination existed, the Board could take into account the failure of plaintiff to provide him a first step hearing. Defendant has not cited any authority to support such a proposition,[5] and the court is not aware of any. The Board itself recognized that it was addressing two wholly separate

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[3] The "just cause" requirement is set forth in section 20, A, 2 of the collective bargaining agreement: "A pilot who has completed his probationary period will not be discharged or disciplined without just cause." P1.'s App. at 370. Defendant agrees that just cause is the test for determining whether Balser's termination was proper. Def.'s Resp. to Summ. J. Mot. at 4.

[4] Defendant additionally argues that nothing makes the offenses committed by Balser just cause for discharge. In making its presentation to the System Board, however, defendant's only argument besides the alleged procedural irregularity was that plaintiff could not support the charges by clear and convincing evidence. P1.'s App. at 6. In other words, plaintiff's rules and policies were quite clear and both parties recognized that the conduct at issue provided just cause for discharge if post-discharge due process arguments were not considered.

[5] The case upon which defendant primarily relies, *International Ass'n of Machinists v. San Diego Marine Constr. Corp.*, 620 F.2d 736 (9th Cir. 1980), is not in point. There, the employee would not have been fired had he talked to management at the investigation stage. Management failed to warn him of the consequences of remaining silent during the grievance proceeding.

issues, whether there was just cause to terminate Balser and whether plaintiff's post-grievance conduct violated the parties' agreement. Having answered "yes" to both questions, the Board decided to create a remedy out of whole cloth:

> Substantial penalties are required to remedy serious violations. We do not have the luxury of curing one violation and ignoring the other. We feel we must address the violations on both sides of the case, and we feel we must address them in such a way as to reduce the probability that they will occur again in the future. Accordingly, we have fashioned a remedy which, we believe, achieves that result.

Pl.'s App. at 21.

Judicial precedent is overwhelmingly clear. If just cause exists to terminate an employee, the arbitrator has no authority to proceed further. There is simply no room to fashion an appropriate remedy. *See, e.g., E.I. DuPont de Nemours & Co. v. Local 900*, 968 F.2d 456 (5th Cir. 1992). As the very first section of the Board's opinion and award reflects, the issues to be decided were whether just cause existed and, if not, what the remedy should be. These were later described as the "substantive issues." Pl.'s App. at 10. Along the way, the Board got sidetracked by the allegation that plaintiff was obligated to provide Balser a hearing, which was described as a "procedural issue." *Id.* Mixing apples and oranges, the Board "fashioned a remedy" beyond its jurisdiction.

VI.

Does the Board's Award Violate Public Policy?

Plaintiff vigorously argues that the Board's award violates public policy by ordering the reinstatement of a captain who, on numerous occasions, carried a deadly weapon through airport security and into the cockpit. Plaintiff also makes the much weaker argument that Balser's reinstatement violates

public policy against discrimination and harassment. Although the security of the flying public has become a matter of utmost concern following the events of September 11, 2001, the court is not persuaded that public policy would prohibit Balser's reinstatement.

VII.

ORDER

For the reasons discussed herein,

The court ORDERS that plaintiff's motion for summary judgment be, and is hereby, granted and that the arbitration award at issue in this action be, and is hereby, vacated. The court further ORDERS that defendant's motions be, and are hereby, denied.

SIGNED April 9, 2002.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX D

AMERICAN EAGLE AIRLINES, INC.

and

AIR LINE PILOTS ASSOCIATION

Pilots' System Board of Adjustment

Location of First Three Days of Hearing:
Los Angeles, California
Location of Final Day of Hearing: Dallas, Texas

Dates of Hearing: October. 3, 4, 5, 2000 and March 23, 2001
Receipt of Briefs: June 3, 2001
Date of Executive Session of Board; July 10, 2001

Date of Opinion: July 27, 2001
Case Number: EGL No. 131-2299
Grievant: Terry L. Balser

Referee: David L. Beckman

Company Board Member:	Union Board Member:
Captain Jim MacAlla Mgr., Training & Standards, ERJ MD 882, Post Office Box 619617 DFW Airport, TX 75261	Captain George Sadler MEC Vice Chairman 1001 W. Euless Blvd. #415 Euless, TX 76040
Counsel for the Company:	Counsel for the Union:
Gregg M. Formella, Attorney P. O. Box 619616, MD 5675 4333 Amon Carter Boulevard Ft. Worth, TX 76155	Everett E. Barber, Attorney Contract Administration 5959 West Century Blvd. Los Angeles, CA 90045

ISSUES

(1) Does the evidence establish just cause under Section 20, A, 2 for the "Final Advisory/Termination" issued to Captain Terry L. Balser, effective November 29,1999?

(2) If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Section 13

SENIORITY

F. LOSS OF SENIORITY

A pilot will forfeit all seniority rights and his name will be removed from the Seniority List when: . . . 2. He is discharged. . . .

Section 20

GRIEVANCES

A. ELIGIBILITY FOR GRIEVANCE FILING

1. A grievance may be filed by any pilot or group of pilots concerning any action of the Company affecting him or them and must be filed in writing with the Vice President of Flight Operations, or his designee. Failure to file a grievance in writing within the time limits specified constitutes a waiver of the grievance.

2. Nothing in this Agreement will extend the right of investigation and hearing for discipline or discharge to a pilot during the probationary period. A pilot who has completed his probationary period will not be discharged or disciplined without just cause.

C. HEARINGS AND APPEALS

1. A first step hearing will be held at the pilot's domicile within fourteen (14) days of the date written request is received by the Vice President of Flight Operations with a copy to the Domicile Chief Pilot. The aggrieved pilot(s) will be given at least seventy-two (72) hours notice of the time and date for such hearing.

D. NOTICES AND DECISIONS

1. All notices of disciplinary action or discharge will be in writing.

2. Copies of all notices and decisions will be mailed to the MEC Chairman, and the Association designated contract administrator.

E. REPRESENTATION

1. A pilot is entitled to have an Association representative present at any step of an investigation or grievance procedure.

2. The Company will provide at least twenty-four (24) hours notice in order for the pilot to obtain representation, with the following exceptions: . . . c. serious misconduct, which in good faith requires an immediate investigation.

G. GENERAL PROVISIONS

1. If any decision made by the Company is not appealed by the pilot within the time limits set forth herein, the decision of the Company will become final and binding.

2. If the Company fails to provide a written decision to the pilot and/or LEC Grievance Representative, or hold a required hearing within the time limits specified, the pilot and the Association may consider the grievance denied.

Section 21

SYSTEM BOARD OF ADJUSTMENT

A. In compliance with Section 204, Title II, of the Railway Labor Act, as amended, a System Board of Adjustment is established for the purpose of adjusting disputes or grievances arising under the terms of this Agreement. Such Board will be known as the Pilots' System Board of Adjustment.

B. BOARD COMPOSITION

The Board will be comprised of three (3) members, one selected by the Association, one selected by the Company and

one neutral member. The three (3) member Board will hear all disputes presented to it . . .

I. FREEDOM TO DISCHARGE DUTY

1. Each and every Board member will be free to discharge his duty in an independent manner without fear that his individual relations with the Company, the Association, or with employees, may be affected in any manner by any action taken by him in good faith in his capacity as a Board member.

EMPLOYER POSITION

The Employer respectfully asks the Board to deny the grievance by Captain Terry Loy Balser, since he was admittedly discharged for (a) engaging in conduct at the workplace which another employee, who happens to be an African American and an immigrant to the United States, legitimately regarded as improper harassment based on race and national origin, (b) carrying a dirk into secured areas of airports and onto Eagle aircraft, and (c) "nodding off" in the cockpit while ostensibly in command of an aircraft carrying passengers in flight. Such conduct clearly and directly interferes with an airline's ability to fulfill duties it owes to other employees and passengers. We submit that Eagle is not required to tolerate such misconduct.

The "due process" arguments by the Association do not undermine the validity of the termination. The Association effectively waived and obviated any due process issue it might otherwise have been able to raise. The Grievant never asked Eagle to allow Mr. Bishop to represent him. Even if he had asked, Eagle would have been justified in declining the request. Eagle was not required to allow anyone to interfere with the writing of the Grievant's statement on November 4, 1999. The Union decided to proceed to arbitration without a first step hearing. Nothing in the agreement requires a first step hearing. There is no "shall" or "must" language. The agreement expressly allows a party to submit a matter to the

System Board without there having been a first step hearing. Nobody forced the Association to do so. To the contrary, Chief Pilot McMurtrie undisputedly advised the Association to pursue the idea of a first step hearing with Director of Flight Operations Walters or with Mr. Shattuck, but there is no evidence that the Association ever even attempted to do so. Accordingly, we ask that the grievance be denied, and that the termination be upheld.

ASSOCIATION POSITION

We contend that the Company did not have just cause to terminate the Grievant. Section 20, C, provides for a first step hearing within 14 days of written request for same. The written request was made on December 8, 1999. In failing to schedule a first step hearing, the Company denied Captain Balser a basic due process right afforded by the Agreement. The purpose of the disciplinary conference is to allow the accused employee an opportunity to respond to the charges, including his explanation of the incident, to raise any mitigating circumstances, to provide additional information not previously obtained through the initial investigation and to respond to the action which was recommended against him.

Reliance on Section G, 2, by the Company does not cure this defect. This section permits the Association to consider the grievance denied, if the Company fails to hold the "required" hearing. The only appropriate avenue left for the Grievant to remedy this denial of due process is by making an issue of it in the System Board proceeding. To suggest that the issue is waived unless a separate contract grievance is filed is ludicrous. To argue that the Grievant waives the issue on the ground that he does not continue to protest or complain about the action is equally ludicrous.

There is arbitral and legal authority for reinstating an employee who has been deprived of his due process rights.

See City of Houston, 112 LA 894; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *City of Bridgeport*, 101 LA 470; and *Great Midwest Mining Corp.*, 82 LA 55. Additionally, there are alternate remedies. The remedy that the Board deems appropriate will depend upon its assessment of the gravity of the Company's culpability. Because the Grievant was denied the representative of his choice in violation of Company policy, and because of the unfair investigation, and since the Grievant never had a rightful hearing early on, who can say with certainty that an earlier examination of the facts would not have produced a result different than discharge? We have shown that the Company's culpability in its treatment of Captain Balser has been extreme and amounts to a pattern of abuse. Therefore, it is not necessary for the Board to delve into the merits of the Company's charges of misconduct. The charges should be dismissed because of the Company's unjustified deprival of Captain Balser's grievance rights. Because of this serious misconduct by the Company, Captain Balser is entitled to reinstatement with full back pay and benefits and restoration of seniority.

In the alternative, we argue that the charges leveled against the Grievant, as set out in out in out brief, were not supported with clear and convincing evidence. We ask the Board to find that the Company failed to prove just cause for discharge.

INTRODUCTION

The September 1, 1997, Pilot Agreement between AMR Eagle, Inc., et al. (herein referred to as American Eagle Airlines, Inc., Eagle, Employer, Company or management) and Air Line Pilots Association, International (herein referred to as Association, ALPA, Union or bargaining unit) contains provisions for a grievance procedure including arbitration before a Pilots' System Board of Adjustment. The parties selected David L. Beckman, Louisville, Kentucky to serve as Neutral Referee.

The first three days of the hearing were held at the Wyndham Hotel, 6225 West Century Boulevard, Los Angeles, California, and the fourth day of the hearing was held at the Hyatt Regency DFW Hotel in Dallas, Texas on the dates set forth on the cover page hereof. The proceedings were transcribed. Full opportunity was given to each party to present evidence, to examine and cross examine witnesses, to state positions and to make arguments with respect to the evidence. Both parties provided the Board Members with written briefs containing their closing arguments on the evidence.

The Board held a telephonic Executive Session on July 10, 2001. The Opinion and Award was drafted by the Neutral Member of the Board following the deliberations in Executive Session. Concurrence in the Opinion by a Board Member is meant to show agreement with the result reached, and should not be necessarily be regarded as approval of every statement made by the Neutral Member in reaching the result.

FACTUAL BACKGROUND

Under date of November 29, 1999, Los Angeles Chief Pilot Janette McMurtrie issued a "Final Advisory/Termination" to Captain Terry L. Balser, after conducting an investigation into a complaint lodged by a federally-protected employee regarding a conversation he had with Captain Balser on November 3, 1999. At the end of the investigation, the Company charged Captain Balser with multiple violations: (1) violation of the Company policy prohibiting "harassment," (2) violation of Rule 10 (failure to observe security regulations), (3) violation of Rule 15 (sleeping on the job), (4) violation of Rule 34 (an action constituting a criminal offense), and (5) violation of Rule 36 (possession of a weapon).

On December 8, 1999, ALPA Grievance Chair, Mark Taylor, wrote to Vice President Flight Operations, Ed Criner, in relevant part, as follows:

> Pursuant to the agreement between American Eagle Airlines, Inc., and the airline pilots in its service, as represented by the Air Line Pilots Association, International, the undersigned, on behalf of Terry L. Balser, hereby files this grievance and requests an investigation and hearing concerning whether the Company has just cause to terminate the pilot.

The Company did not schedule a hearing, as requested in the letter. On February 4, 2000, after a conversation with Chief Pilot Janette McMurtrie, Mark Taylor wrote to her, as follows:

> In our discussion on Sunday, January 22, you expressed a desire to forgo a first step grievance hearing for the above referenced grievance. You stated that you would deny the grievance and therefore did not consider it necessary to have the hearing.
>
> I consider this conversation a denial of Captain Balser's grievance and the Association will be submitting to System Board.

Thereafter, the Association submitted the case for a hearing by the System Board. The evidence was heard by the Board on the dates set forth on the cover page hereof.

The factual background may be summarized, as follows. The case began in November of 1999, after a complaint was brought to the Company by a ramp service employee. The complainant was a Black employee of African, French and German descent. The complainant told the Company that he was offended by inappropriate statements made to him by Captain Balser. The Chief Pilot for the Company in Los Angeles removed Captain Balser from flight status, pending an investigation. The investigation led to further allegations of misconduct by Captain Balser. On the basis of an interview

with a Flight Attendants for the Company, a search was made of Captain Balser's flight bag, which had been left by him in the crew room. Found in the bag was an item the Company's Chief Pilot described as a weapon called a "dirk" The Company charged Captain Balser with possession of a weapon in violation of Section 12020 of the California Penal Code. Captain Balser was also charged with carrying the item through airport screening in violation of Federal Aviation Regulations. Finally, as a result of statements made by one or more of the pilots who were interviewed, the Company charged Captain Balser with sleeping while on flight duty.

The Company held two investigative meetings with Captain Balser in November 1999. During the first meeting, Captain Balser was instructed to submit a written statement of his version of some of the facts leading to his suspension from duty. During the second meeting, Captain Balser was interrogated by Company officials regarding his activities at work, his personal habits, his religious beliefs, his personal philosophy, his military experience, his knowledge and ownership of fire arms, and his racial views.

The evidence consisted of relevant documents and testimony. For its case in chief, the Company provided testimony from: (1) Boris Walckhoff, the complaining employee; (2) Janette McMurtrie, Chief Pilot, LAX; and (3) Sergeant Tyronne Tarvin, Los Angeles Airport Police. The Union presented testimony from: (4) Paul Barath, former Chief Pilot; (5) Herbert Mark, American Eagle Pilot; (6) Monroe Balton, Regional Counsel for FAA; (7) Mark Taylor, American Eagle Pilot; (8) Haralambos "Harry" Tzetzos, American Eagle Captain, former Grievance Chair for ALPA; and (9) Terry Loy Balser, Grievant. On rebuttal, the Company presented testimony from: (10) Captain J. L. Waters, Director of Flight Operations—Line, American Eagle; (11) Jack Shattuck, Manager of Flight Administration for American

Eagle; and (12) Janette McMurtrie, Chief Pilot, LAX. On surrebuttal, the Union presented testimony from: (13) Captain Terry Balser, Grievant. Relevant portions of the testimony and the documents submitted in evidence will be referred to in the Opinion below.

OPINION

It is evident that several inquiries must be made to fully resolve the instant dispute. At the outset of the case, the Union raised several procedural issues, the resolution of which were deferred to this point. The main procedural issue is: (1) Did the Company violate Section 20, Paragraph C? During the case, the Company raised the following substantive issues: (2) Did Captain Balser violate the Company policy against harassment? (3) Did Captain Balser violate Rule 10? (4) Did Captain Balser violate Rule 15? (5) Did Captain Balser violate Rule 34? and (6) Did Captain Balser violate Rule 36?. After answering all of the aforesaid questions, it will be necessary for the Board to resolve the final question: (7) what is the proper remedy?

The Procedural Violations Alleged by the Association

The Association has argued that Grievant Balser's due process rights were violated by the Company. Specifically, the argument .is that he was not granted a "first step hearing" as is required by Section 20, C of the Pilot Agreement, and the Association further asserts that Captain Balser was denied the Union representative of his choice in violation of Company policy. Finally, the Association asserts that the investigation on November 22, 1999 was unfair in that the Grievant was subjected to questioning unrelated to the initial harassment allegations against him.

The Company asserts that the due process arguments are without merit, denies the alleged unfairness in the investigation, and argues that the Association effectively waived the Section 20, C, issue by proceeding to arbitration without a

first step hearing. In the Company view, since the agreement expressly allows a party to submit a matter to the System Board without a first step hearing, there can be no finding of a procedural, or due process violation.

For ease of dealing with the dispute about the meaning of the language, we repeat here the relevant contract language as set forth in Section 20, Grievances, C. Hearings and Appeals, paragraph 1:

> 1. A first step hearing will be held at the pilot's domicile within fourteen (14) days of the date written request is received by the Vice President of Flight Operations with a copy to the Domicile Chief Pilot. The aggrieved pilot(s) will be given at least seventy-two (72) hours notice of the time and date for such hearing.

The discharge letter is dated November 29, 1999. The letter of Grievance Chair, Mark Taylor, to the Vice President Flight Operations is dated December 8, 1999. Mr. Taylor's letter noted the filing of a grievance by Mr. Balser, and requested "an investigation and hearing" concerning whether the Company had just cause. It is not clear whether the Chief Pilot received a copy of the letter, but it is clear that no hearing was scheduled by the Company. In the absence of the hearing the Association proceeded to the System Board.

On the aforesaid facts, we find that the Association substantially complied with the "request" requirement of Section 20, C. We further find that the Company failed to follow the requirements of that Section, in that it did not schedule a hearing "within fourteen (14) days" of the receipt of the written request. We have also concluded that the Company had sufficient notice, under Section 20, of the Association's request for a hearing.

The Company has argued that the Association waived the first step hearing by proceeding to the System Board without such a hearing. The question, thus presented, is whether the

remedy in Section G, 2 constitutes full resolution of the issue created by the Company's failure to schedule a hearing. Section G, 2 states:

> 2. *If the Company fails to* provide a written decision to the pilot and/or LEC Grievance Representative, or *hold a required hearing within the time limits specified*, the pilot and the Association may consider the grievance denied. [Emphasis added]

The stated remedy assures that failure on the part of the Company in responding to a grievance, or its failure to hold a required hearing, will not end the process. The stated remedy assures that the "pilot and the Association" may carry their request for relief to the next level. The question is whether the stated remedy should be considered as dispositive evidence that the negotiators intended to limit the plenary power of the System Board to fashion a remedy for stated failures? We think not.

We find that a distinction must be made between remedial language to cure procedural dilemmas and remedial language to cure substantive contract violations. In our view, the Pilot Agreement contains express language on the former, but is silent on the latter. The stated language favors the union and the grieving party in that it facilitates their attempt to get to the next hearing level. However, such language does not limit the inherent power of the Board to fashion remedies to cure contract violations. Accordingly, we are not persuaded that the wording of Section 20, G, 2 is properly interpreted to embrace the premise that the Association, or the Grievant, waives the first step hearing by considering the grievance denied and by moving on to the next step in the process. Rather, the use of the term "required hearing" persuades this Board that a hearing was mutually-intended by the negotiators. Accordingly, we find that the Company violated Section 20, C in failing to honor the Association's request for a hearing, as further explained below.

We find that Section 20, C,1 requires the Company to schedule a hearing, upon the receipt by the Vice President of Flight Operations of a written request for a hearing. The cited section envisions such scheduling by the Company, and assumes the Company will act on the request, inasmuch as the language specifies that the "aggrieved pilot" be given "at least" 72 hours of notice. We hold that a failure to act on the request for a hearing is a violation of Section 20, C,1.

The indication by the Chief Pilot in January 2000 to the effect that the Union might as well consider the grievance denied has no effect on our ruling in this case. Our ruling is based on the fact that timely notice of the request for a hearing was provided to the Vice President of Flight Operations, and that the failure to take action on that request had the effect of denying a hearing to a pilot who had asked for a hearing. The scheduling action was required "within fourteen (14) days" of the receipt of the written request. The point here is that the negotiators mutually intended a "timely" first step hearing. As already noted, the Company's failure to act in December 1999 is the basis of our finding, not what may have been discussed in the conversation on January 22, between Mr. Taylor and the Chief Pilot. By then, the contract violation had already occurred.

It is the Opinion of the Board, based on the evidence and argument before us, that the Company's failure to schedule a first step hearing in violation of Section 20, C is a serious violation of the Agreement, because it deprived the Grievant of an early opportunity to be heard. Such an opportunity for discharged employees has often been considered fundamental in the world of collectively-bargained agreements. It is in this context that the specific agreement before us must be applied. The failure to schedule the requested hearing is a serious denial of a mutually-intended procedural safeguard (a timely first step hearing). The safeguard was specifically negotiated into the Pilot Agreement by the parties. Since we view the

instant violation as the most serious of the procedural claims made by the Association, we find it unnecessary to specifically address the other procedural claims.

Did Captain Balser violate
Company policy against Harassment?

The evidence is clear that Grievant Balser enjoyed making statements to others for their "shock" value. On November 3, 1999, Grievant Balser talked to Mr. Walckhoff about the war going on in Chechnya, and suggested not only that he enjoyed the fact that fighting was going on, but he asked why Walckhoff was not over there helping his countrymen. During this conversation, which was upsetting to Mr. Walckhoff, Grievant Balser displayed a "reverse swastika" medal. Captain Balser had reason to believe that the medal would be perceived as offensive by African Americans. This same confrontation was accompanied by remarks from Captain Balser suggesting that it was unfortunate that "our tax money" is going to African Americans and Latinos.

Grievant Balser had been warned previously about the importance of complying with the anti-harassment policy of the Employer. We find Captain Balser's conduct of November 3, 1999 to be in violation of the anti-harassment policy of the Employer. The tone was not good-natured. We find that the choice of subject matter by the Grievant, as well as the display of the reverse swastika, was intended to make Mr. Walckhoff feel uncomfortable and unwanted. The Employer has not only a right, but a duty to rid the workplace of such conduct. In this connection, we note that on April 21, 1999, the President of the Employer sent a memo to all employees on the subject of "Unlawful Harassment" in which he stressed, in relevant part, as follows:

> We have talked frequently about the need to treat each other with respect, consideration and professionalism. Unlawful discrimination, including harassment based on sex, race, religion, national origin, ancestry, mental or

> physical disability, medical condition, marital status, age, or sexual orientation, is strictly prohibited by our company policies. Such harassment is contrary to everything we are trying to accomplish and will not be tolerated in the workplace.

In view of the Company policies, and the prior warnings given to the Grievant, we find that Captain Balser had ample reason to know that his conduct toward Mr. Walckhoff lacked "respect, consideration and professionalism" Clearly, a penalty more significant than a warning was required in this instance.

Did Captain Balser Violate Rules 10, 34 or 36?

The Employee Handbook sets forth "Rules of Conduct" with the following preamble:

> The Company's Rules of Conduct are clear, concise statements specifying the conduct the Company and fellow employees expect of each other. The rules are posted in work areas. Violation of these rules may be grounds for dismissal.

Rule 10 cautions employees to "Be sure to observe security and smoking rules in all areas you work or visit." Rule 34 states, in relevant part: "Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal." Rule 36 states in full:

> The possession of firearms, explosives, or other weapons on Company property or while attempting to access secured areas, aircraft, or Company property, or knowingly permitting another employee to do so, is strictly prohibited. This includes both on and off duty periods.

The Company has argued that Grievant Balser violated the above rules based on the fact that he carried a dirk (martial arts weapon) in his flight bag, and repeatedly carried it into secured areas of airports, onto Eagle premises and onto Eagle

aircraft. The item in question was described as a "hard plastic knifelike object" about seven inches long, with a three-sided blade, itself three and one-quarter inches long. The blade narrowed to a sharp point at the tip.

Sergeant Tyrone Tarvin, of the Los Angeles Airport Police, a man with significant knowledge in matters of the martial arts, airport security systems, and with the experience, training and expertise necessary to identify instruments used in the martial arts, as well as new types of weapons, described the item found in Grievant Balser's flight bag as a dirk. The item is made of material which allows it to pass through airport security screening systems. Sergeant Tarvin expressed the opinion that the concealed possession of a dirk is prohibited under federal aviation regulations and is illegal under California Penal Code Section 12020.

The Association does not argue that the item found in Captain Balser's flight bag does not constitute a weapon, and essentially concedes that the possession of the item is a violation of Rule 36. However, the Association has urged that the Board consider the mitigating circumstances. The Grievant had testified that he was not aware that his possession of the item was a violation of the rules. The item had fallen to the bottom of his bag, and he said he had forgotten that it was there. The Association points out that Rule 36 is not one of the rules listed by the Company in its publication entitled, "What About Incidents or Offenses which Warrant Immediate Termination." The Association also argues that the Company failed to prove a violation of FAA Regulation Part 108.

The Regional Counsel for the FAA, Monroe P. Balton, testified that it is part of his job to make decisions regarding enforcement actions in airport security cases. He was familiar with the material of hard plastic, called Dupont Zytel, used in the construction of the Delta Dart. The Union did not concede that the weapon in question was a dirk. Instead, the Union

called it a Delta Dart. It was Mr. Balton's opinion that it would be unlikely for the FAA to take enforcement action against someone taking the item into the secured area of an airport. He noted that under the guidelines used by the FAA, the "delta dart" is too small to be considered a dangerous or deadly weapon.

We note that no criminal charges have been brought against Captain Balser, and therefore there has been no criminal conviction with respect to his carrying the dirk, or the dart. He was not caught in the act of carrying the item through security. Rather, his flight bag was examined, and found to have the dirk in the bottom of the bag. In view of the testimony of Sergeant Tarvin, it is likely that had Captain Balser been arrested for carrying the dirk in his bag and for attempting to pass through security, he would very likely have been convicted, if Sergeant Tarvin had been the arresting officer. On the other hand, whether the FAA would have pressed charges is subject to some doubt.

In applying the rules of conduct, we have no hesitancy in using a common sense approach. That is, the test for determining whether there has been a violation of the rules of employment is not the same as the various tests used in the criminal courts to determine whether criminal law violations have been committed. Greater care is generally taken by the authorities charged with the judicial enforcement of criminal laws, simply because they are dealing with the very freedom of persons who are charged with committing crimes. However, Employers, and this employer in particular, has a right to expect that pilots will use common sense in considering their obligation to live within the Rules of Conduct. A weapon, as was carried by Captain Balser, should not have been carried into the workplace. We do not attach much significance to his statement to the effect that he did not know he was carrying the dirk, or the dart, into the workplace. While he may not have had the presence of mind to

remember that he had it in his bag, he had presence of mind when he placed the item in his bag, knowing that he would be carrying that bag with him into secured areas and onto company property.

Our conclusions on the evidence are as follows: We find the evidence sufficient to support the conclusion that Grievant Balser had reason to believe that he was violating Rule 10, in that he did not make "sure to observe security" rules. We find Sergeant Tarvin's testimony, to the effect that concealed possession of the dirk violates California Penal Code Section 12020, sufficiently persuasive to support the conclusion that the Grievant's action in carrying the dirk in his flight bag falls within the Rule 34 prohibition of "any action constituting a criminal offense." However, the testimony of the FAA Regional Counsel suggests that the FAA, might not have prosecuted in this instance, so we do not find that the Grievant violated FAA regulations. Nevertheless, Rule 36 was violated by the Grievant when he carried the dirk "on Company property."

Did Captain Baker violate Rule 15?

Rule 15 states: "Loafing, sleeping on the job, or intentional restriction of output is prohibited." The Company has asserted that the "Grievant's admitted sleeping (or, as he calls it, 'nodding off') in the cockpit while in flight constitutes yet another, independent justification for his discharge." The Association points out that the reference to nodding off is devoid of any specific flights, dates or identities of Captain Balser's First Officers, and the Association argues that "based on the lack of evidence presented by the Company, this charge should not qualify as any grounds for discharge, and should be given no consideration by the Board."

In dealing with the arguments, we note, first of all, that the rule is clear. "Sleeping on the job" is a violation of the Rules of Conduct. What is not known are the details. Apparently, no

specific charge was made against the Grievant for sleeping, but allegations of sleeping came to light during the investigation of the harassment issue. When Captain Balser was interviewed, he was asked if he ever nodded off in the cockpit. The term "nodded off" was contained in the question, and contrary to the Company's argument above, the term was used by the questioner. Nevertheless, the Grievant responded in the affirmative to the question. The Association has suggested that Captain Balser's answer was an attempt to be candid and cooperative. The Association notes that it is common knowledge that the issue of fatigue has been recognized as a possible explanation for momentary lapses of concentration while on flight duty, and may even account for pilots nodding off briefly. The Company, on the other hand, has asserted that the affirmative answer of the Grievant was "yet further illustration of the flippancy with which the Grievant approached his highly safety-sensitive job."

Needless to say, if the Company's characterization of the Grievant's attitude in making the affirmative answer is based in fact (something about which we have insufficient information to make a judgment), we would have a different view of this matter. In all past cases of sleeping on the job, the undersigned has been helped toward a conclusion by the details surrounding the alleged incident. In this instance, there are no witnesses and there are no details. Accordingly, the very posture of the instant case makes it difficult to make a judgment on the Rule 15 issue. In view of the state of the record, we find that the questions and answers in the interview of the Grievant, on which the Company based its allegation, contain sufficient information for this Board to remind the Grievant of his obligations under Rule 15, and to further state that this Board, as well as the Company, expects all pilots to take Rule 15 seriously.

What is the proper remedy in this case?

The Company has argued that the conduct of the Grievant is sufficient to support the imposition of discharge. In the view of the Company, the three major charges against Captain Balser, the violation of the policy on harassment, the possession of the dirk, and the nodding off in the cockpit, are each independent grounds for termination.

The Company did not believe that any of the procedural issues raised by the Association had any merit. We have noted our disagreement with this view. Our finding is that it was a serious violation of the agreement for the Company to fail to schedule a first step hearing within fourteen days, as is required under Section 20, C.

We are confronted with the dilemma created by the fact that both parties committed serious violations of the Agreement. The Grievant seriously violated his obligations as an employee by engaging in the harassment of a fellow employee, and by possessing a weapon (dirk) "on Company property." In proceeding against the Grievant, the Company failed to schedule a timely first step hearing. Grievant Balser seriously violated the agreement, but the failure to afford him the procedural due process mutually intended by the negotiators of the Pilot Agreement was also serious. Substantial penalties are required to remedy serious violations. We do not have the luxury of curing one violation and ignoring the other. We feel we must address the violations on both sides of the case, and we feel we must address them in such a way as to reduce the probability that they will occur again in the future. Accordingly, we have fashioned a remedy which, we believe, achieves that result

To remedy the fact that Captain Balser was denied the opportunity for a timely first step hearing, we find that reinstatement with some back pay is appropriate. To remedy the serious violations by Captain Balser, we find that a

substantial period of time without pay (in effect, a disciplinary suspension without pay) is appropriate.

Since Captain Balser is going back to the workplace, we expect him to apologize to Mr. Walkhoff for the lack of respect and professional courtesy with which Captain Balser treated him in the past. In the future, Captain Balser would be well-advised to study, in detail, the policies and rules of the Company, and to conduct himself accordingly.

PILOTS' SYSTEM BOARD OF ADJUSTMENT
David L. Beckman, Neutral Referee
Captain Jim MacAlla, Company Member
Captain George Sadler, Association Member
Case No. EGL No. 131-2299, Captain Terry L. Balser

In the Matter of Arbitration between:

AMERICAN EAGLE AIRLINES, INC. EMPLOYER

AWARD

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL UNION

AWARD

1. The grievance of Captain Terry L. Baker is sustained in part, and denied in part.

2. The discharge is hereby reduced to a disciplinary suspension.

3. The Company is hereby directed to reinstate Captain Baker to his position as Captain with no loss of seniority and with full contract benefits, with the exception that back pay shall be in the amount of one-half of the full amount which would have been awarded had he been found totally innocent.

/s/ David L. Beckman
DAVID L. BECKMAN, NEUTRAL REFEREE

_____
CAPTAIN JIM MacALLA, COMPANY MEMBER
I concur ( ), I dissent ( )

/s/ Capt George Sadler
CAPT GEORGE SADLER, UNION MEMBER
I concur (X), I dissent ( )

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed September 11, 2003]

No. 02-10467

AMERICAN EAGLE AIRLINES, INC.,
Plaintiff-Counter Defendant,
Appellee-Cross-Appellant,

v.

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Counter Claimant,
Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 8/14/03, 5 Cir., _____, _____ F.3d _____)

Before WIENER, BENAVIDES, and DENNIS, *Circuit Judges.*

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-6a

APPENDIX F

STATUTORY PROVISIONS

Railway Labor Act

1. Section 184 of Title 45 of the United States Code provides in pertinent part:

§ 184. System, group, or regional boards of adjustment

* * * *

It shall be the duty of every carrier [by air] and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

* * * *

2. Section 153 First (i) of Title 45 of the United States Code provides in pertinent part:

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates or pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

3. Section 153 First (q) of Title 45 of the United States Code provides in pertinent part:

> **§ 153. National Railroad Adjustment Board**
>
> **First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review**
>
> * * * *
>
> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

4. Section 153 Second of Title 45 of the United States Code provides in pertinent part:

> **§ 153. National Railroad Adjustment Board**
>
> **Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards**
>
> Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. . . .
>
> . . . Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute. . . . Compliance with such awards shall be enforcible [sic] by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.